

ceive of the real estate is not equal to that portion thereof which she would be entitled to as dower.

If there had been a total failure in the real devise to her, the case might be governed by different considerations, as the act of assembly requires a disposition of a part of both the real and personal estate to divest the wife of a right to both; and such seems to have been the view taken by the court in *Griffith vs. Griffith's Ex'rs*, 4 Har. & McHen., 101, and *Coomes vs. Clements*, 4 Har. & Johns., 480. But, as in this case, the devise of real estate to the wife was not entirely invalid or inoperative, I do not think she can, because of a failure of a part of such devise, claim indemnity out of the residue of the estate, to the prejudice of the other parties, unless as stated above, the share which she will now receive should be less in value than her dower.

The counsel of Mrs. Harrison, after quoting the language of the 5th section of the 13th sub-chapter of the act of 1798, supposed that a widow, who stands by the devise made to her by her husband, is to be regarded as any other purchaser, and entitled, if the title to the land devised fails, to be compensated therefor out of the residue of the estate of the vendor.

It is true, the section referred to does say, "that a widow accepting or abiding by a devise in lieu of her legal right shall be considered as a purchaser with a fair consideration;" but this language is qualified by the preceding words of the same section, which saves the legal rights of widows only in the cases in which "nothing shall pass by such devise."

If, therefore, anything passed by the devise to the widow, and she stands by the will, it might be difficult to make out her right to compensation out of the residue of the estate, because of a partial failure of the devise to her.

In view, however, of the language of the Court of Appeals in *Coomes vs. Clements*, and having a just regard to the spirit of the act of assembly and the strong equity of the case, I have come to the conclusion, that if the devise to the widow is invalid to such an extent as to make what she receives under the will, less in value than her legal share of her husband's